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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. **79-1435**

Mahoning Women's Center,

Petitioner,

v.

Jack C. Hunter, Mayor and President of the Board of Health; Donald Baker, Chief of Police; Richard Hughey, Herman "Pete" Starks, Patrick J. Ungaro, Robert G. Spencer, Leonard J. Yurcho, Michael J. Crogan, and John T. Murphy, City Council Members; Dr. Samual Goldberg, Douglas K. Everett, Warren Harrell, Jr., Mrs. Doris Rinkov, and Mrs. Joyce Kester, Board of Health Members,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the December 18,1979 final judgment of the Court of Appeals denying litigation costs and council fees in a 42 U.S.C. § 1983 action where the Mahoning Women's Center prevailed on the merits.

QUESTIONS PRESENTED

I. Whether the Court of Appeals abused the discretion under 42. U.S.C. §1988 by not allowing a Civil Rights Plaintiff who successfully challenges a city ordinance unconstitutionally restricting first trimester abortion to recover litigation costs?

II. Whether the Court of Appeals applied an erroneous legal standard in its finding of "special circumstances" that would render a 1988 award unjust?

STATEMENT OF THE CASE

The Center is an Ohio Corporation which proposed to open a low cost medical facility in Youngstown, Ohio to provide women with first trimester abortions and counseling services regarding reproductive health care. The Center leased facilities in October, 1976 to effectuate said planned operations.

Subsequent to the opening of the facility by the Center, the Respondents enacted Chapter 98.00, "ABORTIONS", of the Revised Code of Ordinances. This Chapter attemps to regulate all abortions not performed in a licensed hospital or regulated by the Department of Health of the State of Ohio. No facility could operate or maintain this abortion service without a license issued by the Board of Heath of the City of Youngstown. The Center applied for a license which was denied.

The ordinance would prohibit the performance of a non-hospital abortion without a license issued by the Board of Heath of the City of Youngstown. This provision would apply to all abortions.

The effect of the ordinance was to have an abortion take place in a setting which was equal to that of a surgical unit of a hospital including both the staffs and the equipment required. As stated in Chapter 98.00, the purpose of the ordinance was to require "the highest standards of health care . . . for the protection of the pregnant woman." App. 2a. The provisions of the ordinance requiring the extensive medical facilities and a highly qualified staff was designated exclusively for a facility providing abortion services.

Having applied and been denied a license, the Center filed suit against the City. Medical testimony was provided by both parties at trial, the testimony being directly onflicting regarding the gravity of

the surgery to be performed. Likewise, the testimony was also directly conflicting regarding the qualifications of the staff required to perform said abortions and the complexity and the amounts of the equipment necessary to perform such services.

The Court found that the performance of first-trimester abortions were of a minor nature considering the surgical procedures which the Center would be utilizing in performing said abortions. Following the standards set forth in Roe v. Wade, 410 U.S. 113 (1973) the District Court concluded that Chapter 98.00 is an unconstitutional restriction of the right of the Center to perform first trimester abortions.

The Center then moved the District Court for an award of attorneys fees citing the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C.§ 1988 which gives the Court the discretionary authority to award fees as costs for the litigation of the within cause. The request of the Center was denied by the Court and subsequently affirmed by the Sixth Circuit Court of Appeals.

The Center has subsequently submitted a Petition for Writ of Certiorari.

REASONS FOR DENIAL OF WRIT

The decision below should not be reviewed by this Court for two reasons.

First, the trial Court is given disretionary authority to award attorneys fees under 42 U.S.C.§ 1988. The appellants have not established from the record that the Court has in any way abused that discretionary authority. Secondly, the thought process of the District Court and the Sixth Circuit Court of Appeals is consistent with the conclusions of this Court in its decisions regarding attorneys fees.

I. THE CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT OF 1976, 42 U.S.C.§ 1988 GIVES THE COURT DISCRETIONARY AUTHORITY IN AWARDING ATTORNEYS FEES WHICH SHOULD NOT BE REVERSED ABSENT AN ILLUSTRATION OF ABUSE OF THAT DISCRETION.

While the Petitioners go to great lengths to assert that the legislative intent compels an award of attorneys fees, the respondent would submit that the very statute upon which the authority relies does not make the award of attorneys fees mandatory. The relevant part of Section 1988 states that

> "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the cost." (Emphasis added).

Had the Senate and the Congress been of the mind that every prevailing party in litigation of this nature should be entitled to attorneys fees, the language of the Act would have certainly been more definitive.

Neither the Senate nor the House reports are inconsistent with the approach used by the Sixth Circuit as purported by the appellants. S. Rep. No. 94-1011, 94th Cong., 2d Sees. (1976) and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976). Both reports state that the standard for discretion formed by this Court is Newman v. Piggie Park, 390 U.S. 400, (1968), and Northcross v. Board of Education, 412 U.S. 427. (1973) (per curiam). The decision by the Sixth Circuit in the within cause and the Congressional intent are not inconsistent in view of Newman and Northcross.

The District Court in Naprstak v. City of Norwich, 433 F. Supp. 1369, 1370 concluded that

> "we do not think, however, that attorneys fees must be awarded in all civil rights actions . . . Indeed Congress specifically considered and rejected the option of providing mandatory award of attorneys fees in civil rights actions, wisely leaving such awards in the Court's discretion, to be exercised as each case warrants. See House report at 5-6."

Absent a showing of the abuse of discretion by the Sixth Circuit Court of Appeals and the District Court at the trial level, a determination that attorneys fees should not be awarded is not inconsistent with Section 1988 as enacted by Congress.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH HOLDINGS BY THIS COURT INVOLVING ATTORNEYS FEES IN AN ANALOGOUS CIVIL RIGHTS AREAS, SUCH AS NEWMAN V. PIGGIE PARK, NORTHCROSS V. BOARD OF EDUCATION, AND HUTTO V. FINNEY.

NEWMAN V. PIGGIE PARK. The decision by this Court in Newman does not appear to set forth the conclusions to which the Appellants have alluded. This Court concluded that a prevailing party "Should ordinarily recover an attorneys fee unless special circumstances would render such an award unjust." Newman v. Piggie Park, 309 U.S. 400, 402. This Court then went on to say that the Court did not perceive that any special circumstances existed in Newman which would substantiate the discretion not to award attorneys fees.

This Court does not appear to rule out the good faith of the parties as a criteria in the determination of the award of attorneys fees. This Court does not say that it is no longer necessary to show that one of the litigants "deliberately advance arguments they note to be untenable". Newman at 402.

In its discussion of finding special circumstances in the Newman case which this Court could use in its discretion as to why attorneys fees could not be awarded, this Court, in Footnote 5 in Newman at 402 discussed that this was not even a "borderline case". In an apparent attempt to discuss the frivolous nature of the de-

fense used by the litigants against whom the attorneys fees award was made.

This certainly appears to be an intention by this Court to use the good faith of the defendants at least as a contributing factor in the determination of award of attorneys fees.

NORTHCROSS V. BOARD OF EDUCATION. The issue of attorneys fees resolved in Northcross by this Court was concluded at a time prior to the enactment by Congress of the Civil Rights Attorneys Fees Awards Act of 1976. This Court concluded that Newman was to be the standard upon which attorneys fees should be awarded.

In Footnote 2 of Northcross at 429, this Court paid note that the decision of the issue of attorneys fees was not made in this case absent the clear statutory language permitting such award.

HUTTO V. FINNEY. The award of attorneys fees was deemed by this Court to be

> "adequately supported by the Court's finding that the officials had acted in bad faith in not curing constitutional violations identified earlier." Hutto v. Finney 437 U.S. 678, 689.

It seems apparent from this, and by the Court that the good faith of the litigant is certainly a viable issued in the

in the determination of attorneys fees in civil rights litigation.

This Court went on to say that the

> "District Courts award is adequately supported by its findings of bad faith and that the Act supports the additional award by the Court of Appeals." Hutto at 689.

In this decision, this Court appears to continually discuss the merits of the case as regard to the activities of the litigants in showing their bad faith as a reason for allowing said award. This Court even went as far as to speak of the awarding of the costs including attorneys fees as a "remedial fine". Hutto at 691. In even stronger language it was asserted that

> "we see no reason to distinguish this award from any other penalty imposed to enforce a prospective injuntion." Hutto at 691-692.

The discussion of the circumstances of good faith of the litigants appears to indicate that the good faith or bad faith of the litigants would certainly be a circumstance which would mitigate the awarding of attorneys fees. Since the decision of the Sixth Circuit Court of Appeals evidences a decisional approach which is consistent with the apparent thought process

by this Court in its decisions regarding attorneys fees, the Petition for the Writ of Certiorari by the petitioners should be denied.

Respectfully submitted,

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